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IN THE

Supreme Court of the United States

October Term, 1949

No.

CAPITAL TRANSIT COMPANY, *Petitioner,*

v.

MAUDE J. UNDERWOOD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Capital Transit Company, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED.

The respondent instituted a civil action for damages against your petitioner, which resulted in a verdict and judgment for petitioner (R. 14). Respondent thereafter

filed a motion to set aside the judgment and for a new trial (R. 15), which motion was argued before Judge Holtzoff of the United States District Court for the District of Columbia on February 4, 1949 (R. 16). At the conclusion of argument on this motion Judge Holtzoff delivered his opinion and ruling, denying said motion, from the bench, in the presence of counsel for both parties (R. 18). No order was prepared and presented by counsel, but in conformity with established and well known practice in the District Court, a standard form of order denying the motion for a new trial was signed by Judge Holtzoff and immediately entered in the civil docket on February 4, 1949 (R. 19, 28). Through inadvertence of the Clerk of the Civil Division, a formal notice under Rule 77(d)[1] of the Federal Rules of Civil Procedure of the entry of this order was not sent to counsel for respondent.

Respondent's time for filing notice of appeal expired on March 7, 1949. However, counsel for respondent took no further action in this cause until late afternoon of April 4, 1949. On that date he presented, *ex parte,* a motion to extend time for filing notice of appeal to and including April 4, 1949 (R. 19), and an order granting this motion was signed by Judge Pine of the District Court on that date (R. 20). Respondent's counsel on the same date filed notice of appeal from the Judgment (R. 21). No notice of the motion to extend time for filing notice of appeal or opportunity to be heard thereon was ever given to your petitioner.

On April 8, 1949, upon learning of the action which had been taken by the District Court upon respondent's motion, petitioner filed a motion to vacate the order extending time for filing notice of appeal and to strike the notice of appeal, (R. 21), advancing two grounds in support of its motion. The first of these grounds was that a motion to extend time for filing notice of appeal, made after the

[1] All the Federal Rules of Civil Procedure and statutes involved on this petition are set out in petitioner's brief, infra pp. 7-9.

expiration of the original period prescribed, is not properly an *ex parte* motion under the Federal Rules of Civil Procedure, and that the order granting such an *ex parte* motion was improper. The second ground was that the extension of time for filing notice of appeal was unauthorized by the Federal Rules of Civil Procedure, since respondent could not show excusable neglect based on a failure to learn of the entry of the judgment, as is required by Rule 73(a), in that respondent's counsel was present in court when the denial of his motion for a new trial was announced from the bench, which ruling was, in accordance with established local procedure well known to counsel for respondent, entered immediately in the civil docket without the preparation and presentation of an order by counsel.

Petitioner's motion was argued before Judge Holtzoff of the District Court on April 29, 1949. The Court's ruling on the first ground of petitioner's motion is left in doubt. The Court stated at one point that he was "inclined to view the matter as if the plaintiff came before me *de novo* on an application and notice for enlargement of the time" (R. 27), but later declared that "the extension could be granted *ex parte*" (R. 31). The Court indicated a strong reluctance to deprive respondent of an appeal from the Court's own ruling (R. 30). Therefore, on petitioner's second ground, the Court made a finding of excusable neglect, such being necessary to preserve the right to appeal (R. 32).

On April 29, 1949 an order of Judge Holtzoff was entered denying petitioner's motion to vacate the order extending time for filing notice of appeal and to strike notice of appeal (R. 32).

On May 17, 1949, your petitioner filed in the United States Court of Appeals for the District of Columbia Circuit a motion to dismiss the appeal (R. 1). Petitioner advanced the same grounds therefor which were presented to the District Court to support the motion discussed, supra. No hearing on the motion was granted, and by a *per curiam*

order, dated September 23, 1949, without opinion, the Court of Appeals denied petitioner's motion to dismiss the appeal (R. 12).

JURISDICTION.

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on September 23, 1949. The jurisdiction of this Court to issue a writ of certiorari in this case is invoked under Title 28, U. S. Code Sec. 1254 (Act of June 25, 1948, 62 Stat. ....., ch...).

QUESTIONS PRESENTED.

1. Whether a motion under Rules 6(b)(2) and 73(a) of the Federal Rules of Civil Procedure for an extension of time for filing notice of appeal, made after the lapse of the original time prescribed, may properly be made with neither notice to opposing parties nor a hearing on their objections to the granting of such motion.

2. Whether a party can show "excusable neglect" to file notice of appeal, within the meaning of Rule 73(a), solely because of the failure of the Clerk to send out the notice of the entry of the judgment provided for in Rule 77(d), notwithstanding the fact that such party is chargeable with knowledge of the entry of the judgment, by reason of the presence of his counsel in court when the judgment or order is pronounced.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit have in this case decided questions relating to the necessity of notice to interested parties of a motion to extend time for filing notice of appeal under Rules 6(b)(2) and 73(a) of the Federal Rules of Civil Procedure and to the meaning of "excusable neglect" as

that term is used in Rule 73(a), which have not been, but should be, settled by this Court.

2. On a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, this Court, in 1944, reviewed the case of *Hill* v. *Hawes*,[2] wherein was involved the basic problem of enlarging time for filing notice of appeal. In an effort to resolve the difficulties which arose in that case without resort to the solution of the problem of enlarging time therein employed, the Federal Rules of Civil Procedure, relating to extension of time for filing notice of appeal,[3] were amended in 1946, so as to authorize an extension of time for filing notice of appeal of thirty days, upon a showing of excusable neglect based on a failure to learn of the entry of the judgment. This provision subsequently was incorporated in Title 28, U. S. Code, Sec. 2107[4] (Act of June 25, 1948, 62 Stat. ..., ch....), effective on September 1, 1948. These amended rules and the statute have not been construed by this Court. The Courts below have misconceived the intent and effect of this Court's opinion in the case of *Hill* v. *Hawes* and consequently have erred in interpreting and applying the amended Rules and statute. Petitioner respectfully submits that this Court should issue its writ of certiorari to correct these errors of the Courts below.

3. The questions raised on this petition are of general importance. They concern not only matters in the District of Columbia but vitally affect the orderly administration of justice in all the federal courts. Petitioner respectfully submits that the public interest in clarity and orderliness of proceedings in the federal courts, which interest prompted the formulation of the Federal Rules of Civil Procedure, will be promoted by the prompt settlement of these questions by this Court.

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[2] 320 U. S. 520, 88 L. Ed. 283, 64 S. Ct. 334.

[3] Rules 6(b), 73(a) and 77(d).

[4] See p. 9 infra.

WHEREFORE, your petitioner, Capital Transit Company, prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case, that the issues raised on petitioner's motion to dismiss the appeal may be reviewed and determined by this Court, that this Court determine that the said Court of Appeals lacks jurisdiction to hear and to determine the appeal of this cause therein pending, that the order of the said Court of Appeals may be reversed and set aside; and for such further relief in the premises as this Court may deem just and proper.

CAPITAL TRANSIT COMPANY, *Petitioner*

By

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW.

The United States District Court for the District of Columbia did not render a formal opinion on the denial of petitioner's motion to vacate the order extending time for filing notice of appeal and to strike notice of appeal. A transcript of the hearing on said motion has been made part of the record (R. 25). The United States Court of Appeals for the District of Columbia Circuit denied petitioner's motion to dismiss the appeal without opinion (R. 12).

GROUNDS OF JURISDICTION.

The grounds upon which the jurisdiction of this Court is invoked are sufficiently set out in the petition (p. 4 supra).

STATEMENT OF CASE.

The case is sufficiently stated in the petition (pp. 1-4 supra).

FEDERAL RULES OF CIVIL PROCEDURE AND STATUTES INVOLVED.

The following provisions of the Federal Rules of Civil Procedure are material in the Court's consideration of the issues raised by this petition:

> RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.
>
> (a) Service: When Required. * * * every written motion other than one which may be heard *ex parte*, * * * shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear * * *.

RULE 6. TIME.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules * * * 73(a) and (g), except to the extent and under the conditions stated in them.

(d) For Motions-Affidavits. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. * * *

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

RULE 58. ENTRY OF JUDGMENT.

Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; * * * The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. * * *

RULE 73. APPEAL TO A COURT OF APPEALS.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, * * *, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

RULE 77. DISTRICT COURTS AND CLERKS.

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

Section 2107, as amended, of Title 28, U. S. Code, insofar as here pertinent, provides that:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> * * * *
>
> The district court, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.
>
> * * * *

ASSIGNMENT OF ERRORS.

The Courts below, through their orders, in effect, held as follows:

1. No notice to opposing parties of a motion to extend the time for filing notice of appeal is required, even though that motion is made after the lapse of the original time allowed for filing, and no opportunity need be afforded to opposing parties to object to the granting of such a motion.

2. A party can show "excusable neglect" within the meaning of Rule 73(a), solely because of the failure of the Clerk to send out the notice of the entry of the judgment provided for in Rule 77(d), notwithstanding the fact that such party has knowledge of the entry of the judgment from the date thereof.

Petitioner respectfully submits that the Courts erred in these holdings, and such errors will be urged before this Court.

ARGUMENT.

a. Notice of respondent's motion to enlarge time was essential.

The requirement of notice to parties whose interests will be affected by the action requested in a motion is inextricably connected with the fundamental concept of due process of law. The Federal Rules of Civil Procedure carefully preserve this requirement of notice as to matters of substance, although no single rule sets out in concise form all those motions which require notice to interested parties. The determination as to what motions may properly be made *ex parte* requires reference to the broad requirement of notice contained in Rule 5(a) of the Federal Rules of Civil Procedure and to the particular rule authorizing the motion in question for the purpose of ascertaining whether the general requirement of notice is there relaxed.

Those motions which may be heard *ex parte* are clearly identified in the particular rules authorizing them. An appropriate example is found in Rule 6(b)(1) which vests in the court discretion to order an enlargement of the period for doing certain acts "*with or without motion or notice* . . . if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order . . ." [Emphasis added]. This provision must be contrasted with the language of Rule 6(b)(2) which is involved in this case, where it is provided that the Court may "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . ." Petitioner respectfully submits that these two provisions of Rule 6(b) clearly indicate the method of determining what motions may, under the Federal Rules of Civil Procedure, be heard *ex parte*, and that respondent's motion to enlarge the period for filing notice of appeal, being made after the expiration of the time prescribed, was subject to the requirement of notice contained in Rule 5(a).

The Courts below have erred in holding that petitioner was not entitled to notice of respondent's motion to extend the period for filing notice of appeal, or to a hearing on petitioner's objections to the granting of such a motion. This Court has not considered the construction of these rules relative to the requirement of notice. Petitioner respectfully avers that the prompt settlement of this question regarding the necessity of notice to interested parties should, in the interest of justice and orderly proceedings in all the federal courts, be made by this Court.

b. Respondent could not show "excusable neglect."

The discretion vested in the court by Rule 6(b) to enlarge the period for filing notice of appeal is limited by the provision of Rule 73(a) that such enlargement may be ordered only "upon a showing of excusable neglect based on

a failure of a party to learn of the entry of the judgment." This limitation, which was added by the amendments of 1946, has never been construed by this Court.

The 1946 amendments were motivated by the decision in the case of *Hill* v. *Hawes*[1] which this Court considered on a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. In that case a judgment dismissing the complaint was signed by a judge of the District Court, in chambers, and out of the presence of either party. Upon entry of the judgment in the civil docket, the Clerk failed to send to the parties notice of the entry of the judgment required by Rule 77(d), and the period prescribed for filing notice of appeal expired prior to the filing of such notice. In upholding the action of the District Court in vacating the first judgment and reentering an identical judgment so as to start the period for filing notice of appeal running anew, this Court made the following statement at 320 U. S. 523:

> "It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given."

Petitioner respectfully submits that the improper effect which the Courts below have given to this declaration of this Court has given rise to error in the interpretation and application of the amended Rules 73(a) and 77(d). The lower Courts have, in effect, held that the mere failure of the Clerk to send out the 77(d) notice of the entry of the order denying respondent's motion for a new trial is adequate basis for a finding of "excusable neglect based on a failue of a party to learn of the entry of the judgment" within the meaning of Rule 73(a), notwithstanding such party's actual knowledge of the content of the judgment or order and of its entry in the civil docket. Petitioner sub-

[1] 320 U. S. *520*, 88 L. Ed. 283, 64 S. Ct. 334.

mits that it was not the intention of this Court in promulgating the amended Rules 73(a) and 77(d), or of the Congress in enacting Section 2107 of the new Judicial Code, that the substance of actual knowledge should be negatived by the absence of the formal 77(d) notice in interpreting and applying the "excusable neglect" provision.

While the amendments of 1946 have obviated in certain important respects the problems which arose in the case of *Hill* v. *Hawes,* that decision remains significant as an aid in the construction of the amended rules. The Courts below have, however, misconceived the intent and purpose of this Court's statement in *Hill* v. *Hawes,* and have, as a consequence, erred in interpreting and applying Rules 6(b)(2), 73(a) and 77(d) to the prejudice of your petitioner.

CONCLUSION.

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its supervisory powers in order that a correct construction of the Federal Rules of Civil Procedure for the guidance of all the federal courts may be had; that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case, and finally reverse it.

Respectfully submitted,

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